

**PUBLIC INTEGRITY COMMISSION
MINUTES
September 18, 2018**

1. Call to Order: 10 a.m. Present: Bonnie Smith (Chair); William F. Tobin Jr. (Vice-Chair); Michele Whetzel (Vice-Chair); Commissioners: Andrew Gonser, Esq., Andrew Manus, Kyle Gay; Commission Counsel: Deborah J. Moreau, Esq.

2. Approval of Minutes for August 21, 2018: Moved--Commissioner Gay; seconded—Commissioner Whetzel. Vote 6-0, approved.

3. Administrative Items

A. Commission Counsel filed PIC's response in the Delaware Supreme Court in matter #16-15.

B. No regular meeting on October 16, 2018.

4. Executive Sessionⁱ and Requests for Advisory Opinions, Waivers and Referrals: Moved—Commissioner Manus; seconded—Commissioner Whetzel. Vote 6-0, approved.

5. 18-30 Lewes Code of Conduct (*Commissioners Gonser & Gay recusing when Glen Mandalas, Esq. appeared before the Commission to discuss the outcome of the vote. Mr. Mandalas was not present at the time of the vote.*)

The Commission originally reviewed and approved the City of Lewes' ("City") Code of Conduct in July 1993. The City, through their attorney, Glenn Mandalas, submitted proposed amendments for PIC's review and approval as required by statute. "Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter." 29 Del. C. § 5802(4).

In comparing the current Code of Conduct to the proposed Code of Conduct, the City made several notable changes.

Additions/Changes of Consequence

- § 9-2(F) - Changes the definition of financial interest to vague (maybe unenforceable) terms. While there is an attempt to further clarify the meaning in section H, the definitions leave a lot of room for interpretation.
- § 9-3(A) - States that officials and employees should pursue the City's interests *before* their own. When officials and employees are acting in their official capacity, their personal interests should not be considered at all.
- § 9-3(B) – Again, the language of the code implies that employees and officials may pursue their own interests as long as they pursue the City's interests first.

Omitted Provisions

- No provision prohibiting the use of their City position for special privileges, advancement or gain.
- No prohibition against disclosing confidential information.
- No prohibition against accepting gifts or other things of monetary value.

After evaluation, the Commission decided the proposed code was less stringent than the State code, which was impermissible. *Id.*

The Commission did not approve the City of Lewes' proposed changes to its Code of Conduct. Moved—Commissioner Manus, seconded—Commissioner Gay. Vote 6-0, approved.

6. 18-32 Wilmington Code of Conduct

The City of Wilmington ("City") originally adopted their Code of Conduct in March 1993, after review and approval by the Delaware Ethics Commission (PIC's predecessor). The City, through their attorney William B. Larson, submitted proposed amendments for PIC's review and approval as required by statute. "Any change to an approved code of conduct must similarly be approved by the State Ethics Commission to continue the exemption from this subchapter." 29 Del. C. § 5802(4). Mr. Larson stated that the City decided to review, reorganize, and re-name their Code of Conduct to make it easier to read and understand.

The City planned to change the name of its Code of Conduct to City Ethics Requirements. Their ordinance included both ethics provisions and financial disclosure requirements. The State code did not permit the Commission to review the City's financial disclosure rules. In the State code the financial disclosure rules are set forth in Subchapter II. Financial Disclosure. Because the Commission only has the power to review ordinances related to *this* subchapter, the Commission did not review or consider those provisions. 29 Del. C. § 5802(4) (Subchapter I. State Employees', Officers' and Officials' Code of Conduct).

After reviewing the City's proposed changes, the Commission decided that the amendments did not make substantive changes to the City's Ethics Requirements and found that it was at least as stringent as the State's Code of Conduct. Moved—Commissioner Gay; seconded--Commissioner Whetzel. Vote 6-0, approved.

7. 18-31—Post-Employment

[Employee] worked for a State [Agency]. His job duties included: providing technical information to assist in the creation of manuals; identifying issues in need of remedial measures; reviewing plans, estimates and bid proposals to ensure quality and consistency within the agency; serving as the [Agency's] representative at regional and national professional conferences.

[Employee] was preparing to retire from State service. He was expecting to obtain employment with [one of two private companies which were Agency] contractors. He expected his future employment would involve working on [specific] projects. Such projects would include design and development of plans, specifications and estimates.

[Employee] asked the Commission to decide if his proposed post-retirement employment would violate the post-employment restriction in the Code of Conduct.

For 2 years after leaving State employment, State employees may not represent or otherwise assist a private enterprise on matters involving the State, if they are matters where the former employee: (1) gave an opinion; (2) conducted an investigation, or (3) were otherwise directly and materially responsible for the matter while employed by the State. 29 Del. C. § 5805(d).

One reason for post-employment restrictions is to allay concerns by the public that ex-government employees may exercise undue influence on their previous co-workers and colleagues. *United States v. Medico*, 784 F.2d 840, 843 (7th Cir., 1986). Nevertheless, Delaware Courts have held that although there may be a subject matter overlap in the State work and the post-employment work, that where a former State official was not involved in a particular matter while with the State, then he was not “directly and materially responsible” for that matter. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004, J. Terry (Del. Super. June 30, 1995), *aff’d.*, No. 304 (Del. January 29, 1996). In *Beebe*, while with the State, an official’s responsibilities were to review and make decisions on applications from hospitals to expand their services. It was alleged that he was violating the post-employment law because after he left the State he was representing a hospital on its application. However, the Court found that as to the particular application before his former agency for Nanticoke Hospital, he had not been involved in that matter while with the State, so he was not “directly and materially responsible” for that particular matter.

The Federal Courts have stated that “matter” must be defined broadly enough to prevent conflicts of interest, without defining it so broadly that the government loses the services of those who contemplate private careers after their public service. *Medico* at 843. To decide if [Employee] would be working on the same “matter,” Courts have held that it is the same “matter” if it involves the same basic facts, the same parties, related issues and the same confidential information. *Ethical Standards in the Public Sector: A Guide for Government Lawyers, Clients, and Public Officials*, American Bar Association, Section of State and Local Government Law, Publisher; p. 38. Similarly, this Commission has held that the facts must overlap substantially. *Commission Op. No. 96-75 (citing Medico at 842)*. See also *Beebe*.

To determine if there was substantial overlap, the Commission compared the duties and responsibilities during employment to the post-employment activities. Like the matter in *Beebe*, [Employee] worked on the subject matter while working for the State. However, the court in *Beebe* drew a specific line between the subject matter and its application to specific facts. In analogous situations the Commission had approved post-employment positions for [Agency] workers who left State employment to work for one of the agency’s contractors so long as they did not work on the same projects. *Commission Ops. 12-09 and 13-41*. The Commission is to strive for consistency in their opinions. 29 Del. C. § 5809(5).

[Employee]’s job duties were performed entirely within the Agency and he did not work on specific projects or assignments. As a consequence, the Commission did not discern any overlap between his proposed job duties and his [Agency] duties. When asked if his new job duties would require him to appear before [his former Agency’s] bid committees, he indicated that it was unlikely to occur in the near future and he estimated it would be five years before he would be asked to perform such job duties. In the unlikely event his new employer asked him to appear before an [Agency] bid committee within the next two years, he was advised to recuse himself if the bid committee was comprised of his former co-workers.

[Employee] was also reminded of the prohibition against revealing confidential information gained during his employment with the State. 29 Del. C. § 5805(d).

No violation of the post-employment restriction. Moved—Commissioner Gay; seconded—Commissioner Whetzel. Vote 6-0, approved.

8. 18-33—Personal Interest (*Commissioner Gonser recusing*)

[Member] was one of seven people elected to [a specific Board]. The Board met monthly to discuss and vote on policies, rules and regulations which were then implemented [administrative staff]. Since her election to the Board, [Member]'s daughter was hired as [a staff member].

Board members actively participated in [negotiating collective bargaining agreements]. Shortly before the meeting, the Board engaged in collective bargaining negotiations regarding [staff] salaries and discipline. Since [Member]'s daughter was [part of the staff], she recused herself from the September 2018, vote on the final contract.

She asked the Commission for advice about the need to recuse herself from matters involving [staff] compensation, benefits and discipline so that she could assure compliance with the Code of Conduct.

A. Personal Jurisdiction

Members of Boards fall within the definition of “State employee” and are subject to the State Code of Conduct. 29 Del. C. § 5804. As a result, [Member] fell under the Commission’s jurisdiction.

B. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 Del. C. § 5805(a)(1).

“A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 Del. C. § 5805(a)(1). ‘Matter’ is defined as “any application, petition, request, business dealing or transaction of any sort.” 29 Del. C. § 5804(7). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated. 29 Del. C. § 5805(a)(2)(a). ‘Close relative’ is defined as “a person’s parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.” 29 Del. C. § 5804(1). However, personal or private interests are not limited to narrow definitions such as “close relatives” and “financial interest.” 29 Del. C. § 5805(a)(2). Rather, the law recognizes that a State official can have a “personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. *Shellburne Inc. v. Roberts*, 238 A.2d 331 (Del. Super. 1967). When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del., January 29, 1996).

Obviously, [Member]'s daughter was a “close relative” under the State Code of Conduct. As a result, she had a personal interest as a matter of law. While it could be argued that any financial benefit or detriment which would accrue to [Member]'s daughter would be the same as that which

would accrue to other [staff], [Member]'s involvement with, and influence over, setting the terms of the collective bargaining agreement would be tinged with the influence of nepotism. Therefore, her participation in negotiating a collective bargaining agreement, setting [staff] salaries and benefits, would be a conflict of interest and she should continue to recuse herself from those matters, as she did in September 2018. As to her involvement in matters related to [staff] discipline, [Member] would only have a personal interest if the subject of the discipline was her daughter. Otherwise, she would not be required to recuse herself from those matters.

C. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treats that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test is whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code is being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

Because of the familial relationship, [Member]'s involvement in setting salaries and benefits would likely create an appearance of impropriety amongst the public which was the reason she should continue to recuse herself from those matters. However, her involvement in [staff] disciplinary matters was unlikely to create the same impression of a violation, unless that [staff member] was her daughter. As a consequence, [Member] could participate in matters related to discipline (other than her daughter's) without the need to recuse herself.

[Member] should continue to recuse herself from all matters related to [the staff's] salaries and benefits. There was no need to recuse herself from [staff] disciplinary matters unless that [staff member] was her daughter. Moved—Commissioner Whetzel; seconded—Commissioner Tobin. Vote 5-0, approved.

9. Motion to Go out of Executive Session: Moved—Commissioner Tobin; seconded—Commissioner Whetzel. Vote 5-0, approved. (*Commissioner Gonser not present*).

10. Adjournment: Next meeting Nov. 20th.

ⁱ Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.